

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARYLOUISE EBENAL,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

Case No. EDCV 13-01998-JEM

MEMORANDUM OPINION AND
ORDER REVERSING DECISION OF
THE COMMISSIONER OF SOCIAL
SECURITY

PROCEEDINGS

On November 14, 2013, Marylouise Ebenal ("Plaintiff" or "Claimant") filed a complaint seeking review of the decision by the Commissioner of Social Security ("Commissioner") denying Plaintiff's application for Social Security Disability Insurance benefits. The Commissioner filed an Answer on February 18, 2014. On May 28, 2014, the parties filed a Joint Stipulation ("JS"). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record ("AR"), the Court concludes that the Commissioner's decision must be reversed and this case remanded for further proceedings in accordance with this Memorandum Opinion and Order and with law.

BACKGROUND

Plaintiff is a 50-year-old female who applied for Social Security Disability Insurance benefits on June 15, 2010, alleging disability beginning January 21, 2010. (AR 17.) The ALJ determined that Plaintiff has not engaged in substantial gainful activity since January 21, 2010, the alleged onset date. (AR 19.)

Plaintiff's claim was denied initially on November 18, 2010, and on reconsideration on March 2, 2011. (AR 17.) Plaintiff filed a timely request for hearing, which was held via video before Administrative Law Judge ("ALJ") Lawrence J. Duran on June 6, 2012, in Moreno Valley, California. (AR 17.) Claimant appeared and testified from Palm Springs, California, and was represented by counsel. (AR 17.) Vocational expert ("VE") Kristan V. Sagliocco also appeared and testified at the hearing. (AR 17.) Following the hearing, the record was held open for two weeks to allow Plaintiff to submit additional evidence. As of the date the ALJ made his final decision, no additional evidence had been received. (AR 17.)

The ALJ issued an unfavorable decision on July 20, 2012. (AR 17-26.) The Appeals Council denied review on October 11, 2013. (AR 1-3.)

DISPUTED ISSUES

As reflected in the Joint Stipulation, Plaintiff only raises the following disputed issue as ground for reversal and remand:

1. Whether the decision properly assessed Plaintiff's credibility

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and based on the proper legal standards).

Substantial evidence means "'more than a mere scintilla,' but less than a preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting

1 Richardson v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such
2 relevant evidence as a reasonable mind might accept as adequate to support a
3 conclusion.” Richardson, 402 U.S. at 401 (internal quotation marks and citation
4 omitted).

5 This Court must review the record as a whole and consider adverse as well as
6 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).
7 Where evidence is susceptible to more than one rational interpretation, the ALJ’s
8 decision must be upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599
9 (9th Cir. 1999). “However, a reviewing court must consider the entire record as a whole
10 and may not affirm simply by isolating a ‘specific quantum of supporting evidence.’”
11 Robbins, 466 F.3d at 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
12 1989)); see also Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

13 THE SEQUENTIAL EVALUATION

14 The Social Security Act defines disability as the “inability to engage in any
15 substantial gainful activity by reason of any medically determinable physical or mental
16 impairment which can be expected to result in death or . . . can be expected to last for a
17 continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A),
18 1382c(a)(3)(A). The Commissioner has established a five-step sequential process to
19 determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920.

20 The first step is to determine whether the claimant is presently engaging in
21 substantial gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the
22 claimant is engaging in substantial gainful activity, disability benefits will be denied.
23 Bowen v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether
24 the claimant has a severe impairment or combination of impairments. Parra, 481 F.3d at
25 746. An impairment is not severe if it does not significantly limit the claimant’s ability to
26 work. Smolen, 80 F.3d at 1290. Third, the ALJ must determine whether the impairment
27 is listed, or equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I
28 of the regulations. Parra, 481 F.3d at 746. If the impairment meets or equals one of the

1 listed impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482 U.S.
2 at 141. Fourth, the ALJ must determine whether the impairment prevents the claimant
3 from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).

4 Before making the step four determination, the ALJ first must determine the
5 claimant's residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The RFC is
6 "the most [one] can still do despite [his or her] limitations" and represents an assessment
7 "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The
8 RFC must consider all of the claimant's impairments, including those that are not severe.
9 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

10 If the claimant cannot perform his or her past relevant work or has no past
11 relevant work, the ALJ proceeds to the fifth step and must determine whether the
12 impairment prevents the claimant from performing any other substantial gainful activity.
13 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000). The claimant bears the burden of
14 proving steps one through four, consistent with the general rule that at all times the
15 burden is on the claimant to establish his or her entitlement to benefits. Parra, 481 F.3d
16 at 746. Once this prima facie case is established by the claimant, the burden shifts to
17 the Commissioner to show that the claimant may perform other gainful activity.
18 Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a
19 claimant is not disabled at step five, the Commissioner must provide evidence
20 demonstrating that other work exists in significant numbers in the national economy that
21 the claimant can do, given his or her RFC, age, education, and work experience. 20
22 C.F.R. § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is
23 disabled and entitled to benefits. Id.

24 THE ALJ DECISION

25 In this case, the ALJ determined at step one of the sequential process that Plaintiff
26 has not engaged in substantial gainful activity since January 21, 2010, the alleged onset
27 date. (AR 19.)
28

1 At step two, the ALJ determined that Plaintiff has the following medically
2 determinable severe impairments: left trigeminal nerve schwannoma; migraines; history
3 of pituitary lesion; and closed head injury with loss of consciousness (20 C.F.R.
4 § 404.1520(c)). (AR 19-20.)

5 At step three, the ALJ determined that Plaintiff does not have an impairment or
6 combination of impairments that meets or medically equals the severity of one of the
7 listed impairments. (AR 20.)

8 The ALJ then found that Plaintiff has the RFC to perform light work as defined in
9 20 C.F.R. §§ 404.1567(b) and 416.967(b) and SSR 83-10 with the following limitations:

10 Claimant can lift and/or carry 20 pounds occasionally and 10 pounds
11 frequently; she can stand and/or walk for six hours out of an eight-hour
12 workday with regular breaks; she can sit for six hours out of an eight-
13 hour workday with regular breaks; she requires a sit/stand option at 1
14 hour intervals; she can frequently climb, balance, stoop, kneel, crouch
15 and crawl; she needs ready access to a restroom; and she may be
16 absent or off task 5% of the time.

17 (AR 21-24.) In determining this RFC, the ALJ made an adverse credibility determination.
18 (AR 22.)

19 At step four, the ALJ found that Plaintiff is unable to perform her past relevant
20 work as a truck driver and bus driver. (AR 24.) The ALJ, however, also found that,
21 considering Claimant's age, education and RFC, there are jobs that exist in significant
22 numbers in the national economy that Claimant can perform, including sorting,
23 packaging and office helper. (AR 25.)

24 Consequently, the ALJ found that Claimant was not disabled within the meaning of
25 the Social Security Act. (AR 26.)

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DISCUSSION

I. THE ALJ IMPROPERLY DISCOUNTED PLAINTIFF'S CREDIBILITY

The ALJ decision must be reversed. The ALJ's adverse credibility determination is not supported by substantial evidence as the record was not fully and fairly developed regarding Plaintiff's migraine pain. The ALJ decision also failed to provide clear and convincing reasons supported by substantial evidence for discounting Plaintiff's credibility.

The ALJ's RFC also is not supported by substantial evidence. The ALJ's nondisability determination is not supported by substantial evidence nor free of legal error.

A Relevant Federal Law

The ALJ's RFC is not a medical determination but an administrative finding or legal decision reserved to the Commissioner based on consideration of all the relevant evidence, including medical evidence, lay witnesses, and subjective symptoms. See SSR 96-5p; 20 C.F.R. § 1527(e). In determining a claimant's RFC, an ALJ must consider all relevant evidence in the record, including medical records, lay evidence, and the effects of symptoms, including pain reasonably attributable to the medical condition. Robbins, 446 F.3d at 883.

The test for deciding whether to accept a claimant's subjective symptom testimony turns on whether the claimant produces medical evidence of an impairment that reasonably could be expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991); see also Reddick, 157 F.3d at 722; Smolen, 80 F.3d at 1281-82 esp. n.2. The Commissioner may not discredit a claimant's testimony on the severity of symptoms merely because they are unsupported by objective medical evidence. Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds the claimant's pain testimony not credible, the ALJ "must specifically make findings which support this conclusion." Bunnell, 947 F.2d at 345. The ALJ must set forth "findings sufficiently specific to permit the court to conclude that the ALJ did not

1 arbitrarily discredit claimant's testimony." Thomas, 278 F.3d at 958; see also Rollins,
2 261 F.3d at 856-57; Bunnell, 947 F.2d at 345-46. Unless there is evidence of
3 malingering, the ALJ can reject the claimant's testimony about the severity of a
4 claimant's symptoms only by offering "specific, clear and convincing reasons for doing
5 so." Smolen, 80 F.3d at 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must
6 identify what testimony is not credible and what evidence discredits the testimony.
7 Reddick, 157 F.3d at 722; Smolen, 80 F.3d at 1284.

8 **B. Analysis**

9 Plaintiff has the medically determinable severe impairments of a brain tumor (left
10 trigeminal nerve schwannoma), migraines, pituitary lesion and closed head injury with
11 loss of consciousness. (AR 19, 232, 237.) In determining Plaintiff's RFC, the ALJ found
12 that Plaintiff's medically determinable impairments reasonably could be expected to
13 cause her alleged symptoms. (AR 22.) The ALJ, however, also found that Plaintiff's
14 statements concerning the intensity, persistence and limiting effects of these symptoms
15 were not credible to the extent inconsistent with the ALJ's assessed RFC. (AR 22.)
16 Because the ALJ did not make a finding of malingering, he was required to provide clear
17 and convincing reasons supported by substantial evidence to discount Plaintiff's
18 credibility. Smolen, 80 F.3d at 1283-84. The ALJ failed to do so.

19 1. Failure To Develop The Record On Plaintiff's Migraine Pain

20 Plaintiff challenges the ALJ's credibility determination as to her medically severe
21 impairment of migraines. The only limitation assessed by the ALJ to accommodate
22 Plaintiff's migraine pain is that she would be "absent or off task 5% of the time" (AR 21),
23 which is roughly equivalent to one day per month. The ALJ did not explain how he
24 arrived at this limitation or why he chose 5% instead of 20% or some other number.
25 Plaintiff also alleged she suffers from dizziness and double vision but the ALJ found
26 these impairments to be nonsevere (AR 20) and does not appear to have imposed any
27 limitations to accommodate these impairments.

1 The ALJ discounted Plaintiff's credibility for five reasons, four of which concern the
 2 medical evidence: (1) the objective medical evidence does not support disability, (2)
 3 treatment was essentially routine and conservative in nature, (2) the side effects of
 4 Plaintiff's migraine medication were mild, and (4) no treating source imposed any
 5 functional limitations other than a restriction on driving. (AR 22.) To be sure, an ALJ is
 6 entitled to consider whether there is a lack of medical evidence to corroborate a
 7 claimant's symptoms so long as it is not the only reason for discounting credibility.
 8 Burch, 400 F.3d 676, 680-81 (9th Cir. 2005). In Social Security cases, however, the ALJ
 9 also has a special independent duty to develop the record fully and fairly and to assure
 10 that the claimant's interests are considered. Tonapetyan v. Halter, 242 F.3d 1144, 1150
 11 (9th Cir. 2001); Smolen, 80 F.3d at 1288. That did not happen here.

12 The ALJ in conclusory fashion asserts that the objective medical findings are
 13 "benign" and that the objective medical evidence does not support the alleged severity of
 14 Plaintiff's symptoms. (AR 24.) The ALJ's finding, however, was a generalized finding
 15 addressed to all of Plaintiff's numerous severe and nonsevere impairments rather than a
 16 specific finding regarding Plaintiff's migraines. The Commissioner's only defense of this
 17 ground for discounting Plaintiff's credibility as to her migraines is Dr. Sebti's late 2009
 18 physical examination of Plaintiff (before the onset date) which revealed normal findings
 19 even as to neurological complaints. (JS 27:3-5; AR 225.) The ALJ's reference,
 20 however, concerns Dr. Sebti's neurological examination as to mental status,¹ not
 21 Plaintiff's migraine pain. (AR 225.) In fact, on the previous page, Dr. Sebti notes that
 22 Plaintiff has had headaches since age 13 which had worsened and are "quite severe,
 23 where she cannot function." (AR 224.) (Emphasis added.) The headache pain may last
 24 three to four days. (AR 224.) Dr. Sebti's assessment was "Migraine without aura,
 25 uncontrolled." (AR 226.) (Emphasis added.) In early 2010, Dr. Sebti regarded the

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 27 ¹ Similarly, the ALJ cites Dr. Bargnoni's finding of normal cognitive functioning and no focal
 28 deficits (AR 23) but does not explain why this mental capacity finding is relevant to or inconsistent
 with migraine pain.

1 The ALJ found that Plaintiff's treatment was "essentially routine and conservative
2 in nature" (AR 22) which can be a legitimate basis for discounting credibility. Parra, 481
3 F.3d at 751. Plaintiff, however, was prescribed numerous, powerful drugs and the ALJ
4 does not identify any "more aggressive treatment or surgical intervention" (AR 22) that
5 would have been medically appropriate. The ALJ says that Plaintiff had received only
6 "non-emergency" treatment (AR 22) but Plaintiff testified she went to the emergency
7 room three times in a twelve month period because she could not stand the pain
8 anymore. (AR 57.) The medical records confirm frequent emergency room visits. (AR
9 299, 333, 335, 338, 362, 365.) All of the above appears in the medical evidence of
10 record, including complaints made to her physicians that she suffers from nausea,
11 vomiting, dizziness, sleeplessness and fatigue as a result of her migraines (AR 42, 48-
12 49, 259, 262, 276, 289, 298, 299, 304) and developed balance issues and fell twice
13 within the same year. (AR 276, 289.) These conditions are symptoms of migraine
14 headaches according to Eisenhower Medical Center. (AR 282, 304.)

15 The ALJ asserts that Plaintiff's treating physicians imposed no functional
16 limitations. (AR 22.) Although Dr. Sebti did note that Plaintiff's migraines were "quite
17 severe, where she cannot function" (AR 224), the more important point is that treating
18 physicians often do not volunteer functional assessments unless asked. Dr. Bilezikjian
19 is a consulting orthopedist who was asked to offer an assessment. (AR 315-318.) The
20 ALJ did not give great weight to Dr. Bilezikjian's medium RFC assessment. (AR 24.) In
21 his defense, Dr. Bilezikjian believed that Plaintiff had been referred to orthopedics
22 incorrectly. (AR 318.) He noted that his assessment "can be voided when she has a
23 neurological examination and recommendations by a neurologist which should be the
24 primary evaluator." (AR 318.)

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28 1006 (9th Cir. 2006), but in this case the prescription medications did not relieve Plaintiff's
migraine pain.

1 The ALJ, however, made no referral to a neurologist nor returned to any of the
 2 treating neurologists to request a RFC assessment regarding her migraines. This was
 3 error. Ambiguous evidence or the ALJ's own finding that the record is inadequate to
 4 allow for proper evaluation of the evidence triggers the ALJ's duty to conduct an
 5 appropriate inquiry. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150. The ALJ
 6 may discharge this duty by subpoenaing the claimant's physicians, submitting questions
 7 to them or continuing the hearing. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at
 8 1150. Here, there was an abundance of evidence that Plaintiff's migraines were not
 9 under control despite the administration of powerful medications. What was missing
 10 from the record was a RFC assessment of Plaintiff's migraines without which the record
 11 is inadequate for decision. Dr. Bilezikjian's comments made clear that the record was
 12 ambiguous and inadequate, which triggered the ALJ's duty to develop the record more
 13 fully.

14 Although the ALJ's interpretation of the evidence should not be second-guessed if
 15 based on substantial evidence, Rollins, 261 F.3d 853, 857 (9th Cir. 2001), here the
 16 ALJ's finding is not reasonable nor supported by substantial evidence without a RFC
 17 assessment of Plaintiff's migraine pain. On remand, the ALJ is ordered to recontact a
 18 treating neurologist or retain the services of a consulting neurologist to undertake such
 19 an assessment.

20 2. Plaintiff's Daily Activities Are Not 21 Inconsistent With Plaintiff's Pain Allegations

22 The ALJ also found that Claimant's activities of daily living are inconsistent with an
 23 incapacitating or debilitating condition, which is a legitimate basis for discounting
 24 credibility. Bunnell, 947 F.2d at 345-46. Here, the ALJ recounted Plaintiff's testimony at
 25 the hearing that she spends most days lying down and she is unable to drive but is "able
 26 to do light household chores, grocery shop with her husband, and care for her dog." (AR
 27 21.) Claimant also testified her husband does most of the cooking (AR 37), she does
 28 not take out the trash or do yard work (AR 39), and does not go out with her husband if

1 she is having migraines. (AR 39.) She does not go to church or participate in social
2 organizations. (AR 42.)

3 The above activities are very limited. Nonetheless, without explanation or analysis
4 the ALJ found that the activities above “are the same as necessary for obtaining and
5 maintaining employment.” (AR 22.) The Commissioner also offers no evidence or
6 analysis to support the ALJ’s conclusory finding, but simply repeats that finding. (JS
7 27:26-28:10.) Plaintiff’s activities, moreover, are not inconsistent with migraines that last
8 3 or 4 days and they do not prove Plaintiff is able to spend a substantial part of her day
9 engaging in activities transferable to a work setting. Vertigian v. Halter, 260 F.3d 1044,
10 1049-1050 (9th Cir. 2001). As Plaintiff says, the ALJ’s conclusory finding does not
11 indicate what activities are transferable and what sort of time Plaintiff engaged in the
12 hypothetical transferable activity, and thus is insufficient to establish inconsistent daily
13 activities. Claimant need not be “utterly incapacitated”, Fair v. Bowen, 885 F.2d 597,
14 603 (9th Cir. 1989), or “vegetate in a dark room,” Cooper v. Bowen, 815 F.2d 557, 561
15 (9th Cir. 1987), to be disabled. The ALJ’s finding, as it stands devoid of any meaningful
16 analysis, is neither reasonable nor supported by substantial evidence.

17 The ALJ also asserts that “even if the Claimant’s daily activities are truly as limited
18 as alleged, it is difficult to attribute that degree of limitation to the Claimant’s medical
19 condition, as opposed to other reasons, in view of the relatively benign medical evidence
20 and other factors discussed in this decision.” (AR 22.) The ALJ does not identify what
21 “other reasons” would explain her limited level of activity. Perhaps, the ALJ believes
22 Claimant is exaggerating her inactivity but the ALJ has presented no evidence or
23 analysis to support this seeming speculation. The Court already, moreover, has found
24 that the medical evidence regarding Plaintiff’s migraine pain is not benign and the record
25 not developed fully enough on RFC limitations for her condition.

26 Inconsistent daily activity, in view of the lack of evidence and analysis here, is not
27 a clear and convincing reason supported by substantial evidence for discounting
28 Plaintiff’s credibility.

* * *

The ALJ failed to develop the record fully on Plaintiff's migraine pain. Also, the ALJ's inconsistent daily activities finding is too vague and conclusory to discredit Plaintiff's credibility. The ALJ failed to provide clear and convincing reasons supported by substantial evidence for discounting Plaintiff's subjective symptom testimony.

The Court does not believe the record will be adequate to resolve this case in the absence of an appropriate RFC assessment concerning Plaintiff's migraine pain. On remand, the ALJ shall recontact Plaintiff's treating neurologists for an RFC assessment or retain the services of a consulting neurologist for that purpose.

The ALJ's RFC is not supported by substantial evidence. The ALJ's nondisability determination is not supported by substantial evidence nor free of legal error.

ORDER

IT IS HEREBY ORDERED that Judgment be entered affirming reversing the decision of the Commissioner of Social Security and remanding this case for further proceedings in accordance with this Memorandum Opinion and Order and with law.

DATED: June 12, 2014

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE